**No. 47101-9-II**

Pierce County Superior Court Cause No. 13-2-06890-2

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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JOHN C. ZIMMERMAN, SUSAN LASALLE, and FNM CORP., INC.
Respondents/Cross-Appellants

v.

SHARON D. ROSE (formerly STANCLIFF), in her capacity as Personal Representative of the Estates of Wilma W. Rose, deceased, and Robert E. Rose, deceased,
Appellant/Cross Respondent.

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# REPLY BRIEF
# IN SUPPORT OF CROSS-APPEAL
# BY RESPONDENTS/CROSS-APPELLANTS
# JOHN C. ZIMMERMAN, SUSAN LASALLE, AND FNM CORP., INC.

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## I. INTRODUCTION

Sharon's claims against Zimmerman arose directly as a result of the Rose Joint Venture Agreements,[1] *i.e.*, the business transaction that brought the parties together and was at the heart of every single cause of action in Sharon's complaint.[2] After correctly dismissing each of Sharon's claims as barred by the applicable statutes of limitation,[3] the trial court committed reversible error by failing to award Zimmerman fees and costs as required by prevailing party fee award provisions in the Rose Joint Venture Agreements and the related May 2011 Settlement Agreement. Had Sharon prevailed on the merits, she undoubtedly would have sought (and arguably been entitled to) an award of her reasonable fees and costs as the prevailing party based on the Agreements. Sharon cannot disavow the propriety of such an award to Zimmerman as the prevailing party after failing to establish her claims.

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[1] There are two Rose Joint Venture Agreements. *See* Def. Exs. 13 and 14.

[2] "Sharon" refers to Appellant/Cross Respondent Sharon D. Rose. "Zimmerman" refers to Cross-Appellants/Respondents John C. Zimmerman, Jr., ("John, Jr."), Susan LaSalle ("Susan"), and FNM Corp., Inc.'s ("FNM") and is used in the singular form for readability.

[3] Specifically, after a "mini-trial" on affirmative defenses, the trial court dismissed the then-remaining claims for Conversion, Breach of Fiduciary Duty, Fraud/Misrepresentation, Violation of Consumer Protection Act, and Breach of Express Trust. At or before the mini-trial, Sharon had dismissed her other claims for Breach of Contract, Quiet Title, Breach of Constructive Trust, and Violation of Uniform Fraudulent Conveyance Statute. *See* Letter Ruling at 1-2 (CP 129-30).

Section II(A), *infra*, establishes that Zimmerman is entitled to an award of fees and costs to prevail against Sharon's claims stemming from the Rose Joint Venture Agreement despite Sharon's election to waive its mandatory arbitration provision. Section II(B), *infra*, confirms that the proportionality rule is unwarranted because Zimmerman prevailed against every one of Sharon's claims. Finally, Section II(C), *infra*, establishes that Sharon cannot escape her obligation to reimburse Zimmerman's fees and costs as the prevailing party based on the timing of the filing of Zimmerman's fee motion, particularly where the trial court did not reach the timing issue and Sharon raises it for the first time on appeal.

## II. ARGUMENT

### A. Zimmerman is entitled to an award of fees and costs based on the Rose Joint Venture Agreement despite Sharon's election to waive its mandatory arbitration provision.

The operative Third Amended Complaint demonstrates that all of Sharon's causes of action stem directly from the existence of the Rose Joint Venture Agreement. *See* Complaint. (CP 1-118) To illustrate, Sharon's Fourth Cause of Action for Breach of Contract specifically seeks

relief based on the Rose Joint Venture Agreement.[4] (CP 14-15) Similarly, in her Third Cause of Action for Breach of Fiduciary Duty, Sharon alleges that FNM stood in a fiduciary relationship based upon the terms of the Rose Joint Venture Agreements, and Zimmerman and FNM breached that duty. Sharon's claim to the five acre parcel existed only through the Rose Joint Venture Agreement. (CP 13-14)

Paragraph 8.10 of the Agreement provides, in full, as follows:

> 8.10 Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach of any provisions thereof, shall be settled by one (1) arbitrator appointed by the Parties in accordance with the rules then in effect of the American Arbitration Association (herein "The AAA"). The arbitrator shall be a lawyer licensed to practice law in Washington with knowledge and expertise in the practice of construction and real estate development law. If the parties are unable to agree on such arbitrator, the AAA shall appoint the arbitrator.
>
> The parties shall be entitled to invoke the rules of discovery applicable to Washington State court proceedings. The arbitration proceeding shall be conclusive and any party to any award rendered in any such arbitration proceeding shall be entitled to have judgment entered hereon. **The arbitration shall determine the "prevailing party" and such party shall be entitled to its reasonable**

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[4] Throughout the action, Sharon has asserted a claim for Breach of Contract based on the Rose Joint Venture Agreement. Sharon prosecuted this claim up and through the bench trial, after which the Court dismissed the Breach of Contract claim as, after presentation of the evidence on the final day of trial, Sharon conceded that the Breach of Contract claim was barred by the statute of limitations. (RP 403:11-13)

> **attorneys' fee and costs which shall be part of the award.** Arbitration shall take place in Seattle, Washington.

*See* Def. Ex. 13, Rose Joint Venture Agreement at 12, ¶ 8.10 (underline in original; boldface emphasis added); *see also* Def. Ex. 14 at 11, ¶ 8.10.

To reiterate, each of Sharon's claims arise from and/or relate to the Rose Joint Venture Agreement. (CP 1-18) As a result, Sharon was entitled to insist on arbitration of this dispute under its Paragraph 8.10. *See* Def. Ex. 13, Rose Joint Venture Agreement, ¶ 8.10 (providing in part that "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach of any provisions thereof, shall be settled by one (1) arbitrator....").

Instead, Sharon elected to assert her right to waive arbitration and commence the underlying action. *B & D Leasing Co. v. Ager*, 50 Wash. App. 299, 303, 748 P.2d 652 (1988) (holding that parties may expressly or impliedly waive the right to arbitrate "by failing to invoke the provision when an action is commenced, or by conduct inconsistent with any other intention but to forgo the right to arbitration."); *see also Shoreline Sch. Dist. No. 412 v. Shoreline Ass'n of Educ. Office Emp.*, 29 Wash. App. 956, 958, 631 P.2d 996 (1981) *amended sub nom. Shoreline Sch., Dist No. 412 v. Shoreline Ass'n of Eduacational Office Emp.*, 639 P.2d 765 (Wash. Ct. App. 1982). (CP 1-18) But Sharon's waiver of arbitration does not waive or otherwise invalidate the balance of the terms of the Rose Joint Venture

Agreement. *Shepler Const., Inc. v. Leonard*, 175 Wash. App. 239, 248-49, 306 P.3d 988 (2013) (*citing Otis Hous. Ass'n, Inc. v. Ha*, 165 Wash. 2d 582, 588, 201 P.3d 309 (2009)).

Consequently, the portion of Paragraph 8.10 which provides that the prevailing party "shall be entitled to its reasonable attorneys' fee and costs" remains intact. *See* Def. Ex. 13, Rose Joint Venture Agreement, ¶ 8.10. As the prevailing party, Zimmerman is entitled to such an award. *Shepler Const., Inc.*, 175 Wash. App. at 248-49.

This determination is not affected by Sharon's strained, if not incomprehensible attempt to distinguish *Shepler Const., Inc.*, 175 Wash. App. 239. *See* Reply Brief and Response to Cross Appeal at 24. Indeed, whether "the prevailing party issue was decided in advance of a trial on remand" is a distinction without a difference. *Id.* Sharon fails to challenge that the *Shepler Construction* case stands for the proposition that a fee award is proper under a prevailing party provision in an agreement despite both parties' waiver of the right to compel arbitration of their dispute regarding the agreement. *See* Reply Brief and Response to Cross Appeal at 24; *Shepler Const., Inc.*, 175 Wash. App. at 248-49. *Id.*

Any doubt as to whether the parties' intended that under the Rose Joint Venture Agreement the prevailing party is entitled to an award of fees and costs *regardless of whether the claims are arbitrated or decided*

*by a court* is dispelled by Paragraph 7.3.3, entitled "Remedies". *See* Def. Ex. 13, Rose Joint Venture Agreement, ¶ 7.3.3. Specifically, Paragraph 7.3.3 provides that a "nondefaulting Joint Venturer may...pursue such other or further remedies at law or in equity...." *Id.*

In other words, the Rose Joint Venture Agreement specifically contemplates the scenario in which one or more of the parties elects to waive arbitration and the rights and liabilities set forth in the remainder of the agreement is decided "at law or in equity" by a court of competent jurisdiction. *See* Def. Ex. 13, Rose Joint Venture Agreement, ¶ 7.3.3. Notably, Sharon apparently agrees that the parties remain bound by the balance of the terms of the Rose Joint Venture Agreement as, again, her Fourth Cause of Action for Breach of Contract is based on alleged breaches of that Agreement. (CP 14-15) Sharon would not have brought the Breach of Contract claim in the underlying action unless the parties' rights and obligations under the Rose Joint Venture Agreement survived despite her waiver of its mandatory arbitration provision.

Accordingly, the trial court should have awarded fees and costs to Zimmerman as the "prevailing party", despite Sharon's waiver of arbitration. *Singleton v. Frost*, 108 Wash. 2d 723, 727, 742 P.2d 1224 (1987) (holding where a contract provides for an award of attorney fees, the trial court does not have the power to completely deny fees); *see also*

*Kofmehl v. Steelman*, 80 Wash. App. 279, 286, 908 P.2d 391 (1996); RCW 4.84.330.

This determination is not affected by the fact that John, Jr. and Susan were not parties to the Rose Joint Venture Agreement. *See* RCW 4.84.330; Def. Ex. 13, Rose Joint Venture Agreement. In this regard, RCW 4.84.330 provides:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, **whether he or she is the party specified in the contract or lease or not**, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.
>
> Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.
>
> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

(emphasis added).

In other words, as the representative to parties to the Rose Joint Venture Agreement (*i.e.*, Robert E. Rose and Wilma W. Rose) on which

her claims are based,[5] Sharon is liable to reimburse the fees and costs of John, Jr. and Susan as the prevailing parties, even though they were not parties to the Rose Joint Venture Agreement which gave rise to the dispute (and on which Sharon's Fourth Cause of Action of Breach of Contract is based). *See* RCW 4.84.330. (CP 14-15) The rule protects litigants (such as John, Jr. and Susan) who are required to defend meritless claims (like those brought by Sharon) based on an agreement to which they are not even a party. *Id.*

In a related vein, the trial court correctly determined that Sharon's causes of action for Breach of Fiduciary Duty, Quiet Title and Fraudulent Conveyance were barred under principles of *res judicata.*[6] (CP 132) Accordingly, under RCW 4.84.330, Zimmerman is also entitled to an

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[5] Significantly, but for the Rose Joint Venture Agreement, this lawsuit would not have been filed; the Rose Joint Venture Agreement was the business transaction that brought the parties together and was at the heart of every single cause of action in Sharon's complaint. The position is supported by the Second Cause of Action for Constructive Trust and Breach of Express Trust, which specifically highlights the existence of the Rose Joint Venture Agreement as the basis for the alleged liability. *See* Third Amended Complaint at 12-13, ¶ 23. (CP 12-13)

[6] Specifically, the trial court correctly found in its letter decision filed December 11, 2014 that "Sharon Rose was aware or should have been aware of a lawsuit filed under Pierce County Cause No. 10-2-07610-2 by FNIG against John Zimmerman, Jr. in March 2010 prior to or at the time it was filed. She was certainly aware of the suit prior to settlement and dismissal with prejudice of that suit in May 2011." *See* December 11, 2014 Letter Decision at 3, ¶ 12. (CP 131) The trial court went on to state that "[t]his claim involves the same subject matter, was a cause of action in the 2010 action involving the same parties and Sharon Rose was in privity with FNIG and therefore represented in that litigation." *See* December 11, 2014 Letter Decision at 4, ¶ 7. (CP 132)

award of fees and cost as parties which sued under, and prevailed on, the May 2011 Settlement Agreement, which also contains a prevailing party fee provision in its Paragraph 18. *See* Ex. 33.

**B. The proportionality rule is unwarranted because Zimmerman prevailed against each and every one of Sharon's claims.**

The trial court correctly determined that Sharon failed to prevail on even a single cause of action in this lawsuit, as established in the Respondent's Brief. (CP 129-33) As a result, in arguing that the Court should remand for a determination "for application of the proportionality rule", Sharon misplaces reliance on *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wash. App. 203, 242 P.3d 1, 1261 (2010). *See* Reply Brief and Response to Cross Appeal of Appellant Sharon at 25.[7]

That case stands for the proposition that "[i]n a contract dispute where 'several distinct and severable claims' are at issue, the determination of the prevailing party may be subjective and difficult to assess." *Id.* at 232 (quoting *Marassi v. Lau*, 71 Wash. App. 912, 917, 859

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[7] The copy of the Reply Brief and Response to Cross Appeal of Appellant Sharon provided to counsel for Zimmerman contains two pages numbered "25". This citation is to the first of those two pages marked "25", in which Sharon argues that "the more appropriate disposition of this issue of attorney's fees should be remanded to the Trial Court for application of the proportionality rule as is applicable even in contract cases where there are distinct and severable claims."

P.2d 605 (1993) *abrogated by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash. 2d 481, 200 P.3d 683 (2009)). *Cornish College of the Arts* further states that "[i]n such a case, we apply the proportionality approach, pursuant to which each party is awarded attorney fees for the claims on which it succeeds or against which it successfully defends and the awards are then offset." *Id.* (*citing Marassi*, 71 Wash. App. at 918). Here, application of the proportionality approach is unwarranted because Sharon did not prevail on a single "severable" claim. *Id.* (CP 129-33)

### C. Sharon cannot escape her obligation to reimburse Zimmerman's fees and costs as the prevailing party based on the timing of the filing of Zimmerman's fee motion.

Sharon argues for the first time on appeal that the fee motion should be denied because it was brought "later than 10 days after entry of judgment", *i.e.*, the timeframe provided by CR 54(d)(2) for bringing a motion "for attorneys' fees and expenses". (CP 219-23) However, this Court should not allow Sharon to escape her obligation to pay Zimmerman's fees and costs as the prevailing party under the Agreements because Sharon cannot establish any prejudice to Sharon based on the timing of the filing of the fee motion. *See* Reply Brief and Response to Cross Appeal of Appellant Sharon at 27-32.

In this regard, the prevailing party is entitled to an award of reasonable fees and costs even if brought more than 10 days after entry of

judgment absent a showing of prejudice by the non-prevailing party. *O'Neill v. City of Shoreline*, 183 Wash. App. 15, 22-23, 332 P.3d 1099, 1104 (2014). "A party establishes prejudice by showing 'a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to provide countervailing oral argument and submit case authority.'" *Id.* (citing *Zimny v. Lovric*, 59 Wash. App. 737, 740, 801 P.2d 259 (1990).

In this case, Sharon does not argue, and in any event cannot establish, that there is any such "prejudice" based on the timing of the filing of Zimmerman's motion for fees. *See* Reply Brief and Response to Cross Appeal of Appellant Sharon at 27-32. Sharon had the benefit of the applicable timeframe in which to respond to and oppose the motion provided by the Civil Rules and took advantage of the opportunity by filing a response brief. (CP 219-23)

In addition, throughout this case, Sharon was on notice that Zimmerman would be seeking the payment of their attorneys' fees and costs incurred in the defense of this litigation.[8] The Agreements involved in the dispute clearly provide for an award of attorneys' fees and costs to the prevailing party. *See* Exs. 13, 14 and 33. In short, Zimmerman's

[8] *See* Defendants' Answer to Complaint, filed May 7, 2014, and Defendants' Answer to Third Amended Complaint, filed November 26, 2014. (CP 122-28)

request for fees could not have been a surprise to Sharon, and therefore, she was not prejudiced based on the timing of filing of the fee motion.[9]

Notably, in opposing the fee motion Sharon did not raise or preserve the timing argument based on CR 54(d)(2) or otherwise, as again, this is a new argument on appeal. (CP 219-23) Likewise, in (incorrectly) denying Zimmerman's motion for fees, Judge Martin stated that she did not rely or rule on or otherwise reach the issue of the timing of the *fee motion.*[10] (CP 247-48, 299; RP 13:1-3)[11] Because the trial court's decision was not based on the timing of the filing of the fee motion and Sharon

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[9] As a result, Sharon misplaces reliance on *Wagner v. McDonald*, 10 Wash. App. 213, 216, 516 P.2d 1051, 1050 (1973) for the proposition that "[a] dismissal with prejudice is…a judgment." *See* Reply Brief and Response to Cross Appeal of Appellant Sharon at 27. The issue, rather, is whether Sharon was prejudiced by the timing of the motion; not whether the trial court's December 11, 2014 decision was a judgment or order. *O'Neill*, 183 Wash. App. at 22-23. Moreover, given the unique posture of this trial court's decision after a "mini-trial" regarding only affirmative defenses, the trial court's decision should be treated as an order for purposes of CR 54(d)(2), which provides another basis on which this Court can determine Zimmerman's fee motion was timely. *O'Neill*, 183 Wash. App. at 23 (noting distinction between "judgment" and "order" for purposes of applicability of 10 day timeframe under CR 54(d)(2)). Finally, for the same reasons, this Court should reject the argument that the fee motion is untimely under CR 59(b). *See* Reply Brief and Response to Cross Appeal of Appellant Sharon at 28.

[10] The trial court, however, also incorrectly denied the fee motion in part based on the incorrect finding that Zimmerman failed to timely file a *cross-appeal*. (CP 248) The trial court erred by denying the fee motion on this basis. *See* RAP 2.4(g) and 7.2(i).

[11] "RP" refers to the Report of Proceedings on February 27, 2015 regarding Zimmerman's Motion for Fees, not the Report of Proceedings on December 2, 2014.

failed to preserve the timing issue, this Court should disregard Sharon's arguments on the (new) timing issue.[12]

Finally, it is worth noting that Sharon *requests* that this Court remand for further proceedings in the trial court on the prevailing party fee issue (albeit based on her flawed proportionality rule argument refuted in Section II(B), *supra*). *See* Reply Brief and Response to Cross Appeal of Appellant Sharon at 25. In other words, despite Sharon's new argument regarding timing, Sharon ultimately concedes that this Court should remand and direct the trial court to decide the fee issue in accordance with the mandate of this Court. *Id.* Thus, even assuming (but not conceding) that Sharon's untimeliness argument is correct, if this Court affirms the dismissal of Sharon's claims (as requested by Zimmerman), the time for filing a motion under CR 54(d)(2) to establish the amount of attorneys' fees and costs recoverable by Zimmerman as the prevailing party would

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[12] Despite Sharon's protestations to the contrary, the issue of fees generally is properly before this Court on appeal under RAP 7.2(i). Further, RAP 2.4(g) provides that "[a]n appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits."

begin to run *after* remand. *See* RAP 12.2.[13] At this point, Zimmerman's fee request is timely.

## III. CONCLUSION

While this Court should affirm the trial court's decision to dismiss the claims against Zimmerman (CP 129-32), the trial court erred as a matter of law by denying Zimmerman attorneys' fees and costs as the prevailing party under the fee provisions in Paragraph 8.10 of both Rose Joint Venture Agreements (Exs. 13 and 14) and Paragraph 18 of the May 2011 Settlement Agreement (Ex. 33). Consequently, this Court should reverse the trial court's February 27, 2015 Order Denying Defendants Motion for Fees and Costs (CP 247-48) and related April 2, 2015 Order on Motion for Reconsideration of the Motion for Fees and Costs (CP 299) and, on remand, direct the trial court to award Zimmerman attorneys' fees and costs as the prevailing party.

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[13] RAP 12.2 provides in full as follows: "The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require. Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)(2). **After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.**" (emphasis added)

Respectfully submitted this 21st day of September, 2015.

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